Supreme Court, U.S.
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IN THE

Supreme Court of the United States

573 JACKSON AVENUE REALTY CORP.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK,
as Collateral Agent and Custodian for the NYCTL 1999-1 Trust,

Respondents.

On Petition For A Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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March 15, 2010

QUESTIONS PRESENTED

Whether due process of law permits the court to divest the petitioner/owner of its property who has deposited all money due and owing into court with the Court then misconstruing RPAPL § 1341 and CPLR § 5519(a)(2) which have no requirement that a court order is first needed to fix the amount to be deposited with the clerk, in order to stay the foreclosure sale?

Whether due process of law permits the court to divest the petitioner/owner of its property and permit the entry of a judgment of foreclosure which includes amounts which the petitioner has already paid and an unreasonable claim for legal fees and costs all without notice and/or a hearing, as to the amount alleged to be due?

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the undersigned attorney of record for ***573 Jackson Avenue Realty Corp. (the "Petitioner")*** hereby certifies that the Petitioner is a New York closely held corporation with no parent corporations and no publicly held corporations that own 10% or more of the Petitioner.

Dated: New York, New York
March 11, 2010

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IN THE

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Respondents.

OPINIONS BELOW

Memorandum Opinion of the State of New York Court of Appeals dated December 15, 2009 appears at appendix A of this petition.

The Memorandum Order of the Appellate Division—First Department of Supreme Court of the State of New York, dated October 28, 2008, appears at appendix B of this petition.

The Memorandum, Decision & Order of the Supreme Court, Bronx County, dated November 30, 2007, Justice Renwick appears at appendix C of this petition.

The Judgment of Foreclosure and Sale, Supreme Court, Bronx County, Justice Renwick dated Sep-

tember 18, 2006, appears at appendix D of this petition.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is predicated upon issues of divesting one of its property, without Due Process and in violation of the Fourteenth Amendment of the United States Constitution. An opinion dated December 15, 2009 was issued by the Court of Appeals of the State of New York.

That the within Petition concerns the reversal of a Judgment of Sale as to the foreclosure of a tax lien, regarding real property in Bronx County, with the lower Court order dated November 30, 2007, and the affirmation of said order by the Appellate Division, First Department entered on October 28, 2008, and their failure to properly acknowledge the Petitioner's ownership interest in the property, and its ability to Stay the foreclosure sale and to retain the Petitioner's ownership interest in its real property.

Also at issue is the Judgment of Foreclosure, dated September 18, 2006 and entered on May 24, 2007, which entered Judgment against the Petitioner without a hearing on the amount actually claimed to be due and owing, and included sums disputed by the Petitioner.

573 Jackson Avenue Realty Corp. originally appealed Justice Renwick's Order, dated November 30, 2007, which was in favor of the Petitioner, wherein the Order, specifically, is contrary to the

RPAPL § 1341, CPLR § 5519(a)(2) and the laws of the State of New York, as it permitted the foreclosure sale to proceed regardless of the Petitioner's compliance with the statutory language of RPAPL § 1341 and CPLR § 5519(a)(2), since the Judgment amount was deposited with the Clerk of the Court, prior to the sale, with the Judgment amount being disputed, as it was entered without a hearing, highly inflated, and did not account for money paid by the Petitioner while improperly including a claim for legal fees. Hence, Justice Renwick, then the Appellate Division, First Department, and now the Court of Appeals of the State of New York, have misconstrued and overlooked the true meaning of the CPLR § 5519(a)(2), RPAPL § 1341, and the laws of the State of New York with a proper interpretation thereof leading to a favorable decision for the Petitioner. Hence, although the Petitioner was granted leave to appeal to the Court of Appeals, the lower Court's rulings were affirmed.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution Fourteenth Amendment along with the Due Process Clause thereof.

INTRODUCTION AND STATEMENT OF THE CASE

573 Jackson Avenue Realty Corp. petitions for a Writ of Certiorari to review the Summary Opinion of the Court of Appeals for the State of New York.

While there are several significant issues presented in this petition for Certiorari, one of the main issues is whether the Petitioner's property was improperly taken from it. We believe that the laws of the State of New York should not permit the taking of one's property where the owner complied with the relevant statutes, paid all sums due into Court, prior to the sale, and assisted in the just and prompt determination of what sum, if any, was due the Respondent.

That the within action is a Tax Lien Foreclosure Action, wherein the Respondent obtained a Judgment of Foreclosure in favor of Respondent and against the Petitioner based upon the alleged nonpayment of the sum of $2,412.75. Specifically, the Respondent, as an assignee of a NYC Tax Lien, obtained payment from the property owner, 573 Jackson Avenue Realty Corp., with respect to an unpaid tax lien. Thereafter the facts are relatively simple and undisputed. Specifically, prior to the commencement of suit, the Petitioner was seeking a Forbearance Agreement from the Respondent wherein said Forbearance Agreement requested $2,412.75, via monthly payments of $397.97. Instead of making the installment payments, the Petitioner paid the $2,412.75, in full and thereby reasonably believed this matter was concluded. However, instead of concluding this matter, the Respondent, on October 22, 2002, and without notice, commenced the within action—which was about 7 months following its receipt of the Petitioner's payment, "in full" to the Respondent. That

with regard to the Respondent's commencement of suit, although the Respondent had the Petitioner's address, since March 2002, it elected not to reject the payment, not to notify the Petitioner of any rejection of payment, and then elected to serve the Petitioner with process, but failed to advise its process server of the Petitioner's address, and proceeded to a default Judgment, via an Order of Publication. Specifically, although the Respondent could have easily served the Petitioner with process, but for reasons best known to the Respondent, it opted to proceed via publication—knowing full well that publication would provide the Petitioner with no notice herein.

Undisputed, was the fact that the Respondent commenced the within action, seven (7) months after receiving payment in full, without notifying the Petitioner. That the Respondent has then alleged to have incurred $10,000.00+ in legal fees regarding said actions and omissions and has admittedly thereafter refused to provide the Petitioner with a valid pay-off figure. Furthermore, the assignment of Lien, from New York City, does not include the right to seek legal fees. As to the lien itself same was just $2,412.75 and was paid on April 9, 2002, with the Petitioner having fully advised the Respondent of his whereabouts, but with the Respondent electing to submit a false affidavit and application to the Court alleging it could not locate the Petitioner, after it had allegedly utilized due diligence to locate the owner.

Hence, in response to the Petitioner's original motion, brought by Order to Show Cause to vacate a default Judgment against the Petitioner, as was decided by the Court's October 27, 2003 Decision and December 10, 2003 Order, the Court below ruled that the Respondent's action was dismissed, as to this Petitioner, 573 Jackson Avenue Realty Corp.

That the Court's October 27, 2003 Decision further evidences the extent that the Respondent will go, in order to secure a Judgment herein, i.e., via "sewer service".

Regardless of the Court's October 23, 2003 Decision and December 10, 2003 Order, the Respondent commenced a Second Action seeking the same relief.

That the Respondent's Complaint is based upon a limited issue, to wit: the alleged tax arrears of $2,412.75, with the Court having dismissed the action, bearing Index No. 27686/02. Regardless, this action continued to Judgment, with the Respondent's motion to enter a judgment of foreclosure as the Court below, as affirmed on appeal, proceeded regardless of the Petitioner's defenses of "Res Judicata", "Collateral Estoppel" and the "Law of the Case", and entered Judgment for $3,309.72 as the amount due for the unpaid tax lien, plus $1,545.00 in Court costs and $9,307.50 as and for reasonable legal fees.

Upon receipt of the Judgment of Foreclosure, the Petitioner believed said Judgment which was sub-

mitted to the referee without notice to the Petitioner, was incorrectly calculated and entered, was without any basis, with the Referee's report not part of the Respondent's submission; hence, an appeal was duly filed.

Thereafter on August 17, 2007 an undertaking in the amount of $19,563.77 was paid into Court with the said sum of $19,563.77 having been obtained from the Respondent as the pay-off sum of all costs, disbursements, and legal fees, with interest all due through August 17, 2007.

That the Respondent was duly notified of the aforesaid deposit into Court, of the sum of $19,563.77, on August 20, 2007, with the actual amount due being reduced, by the Respondent, to $19,078.96, as per its August 16, 2007 fax/letter.

At no time did the Respondent respond to the Petitioner's August 20, 2007 letter; hence, the Petitioner properly believed that the sale would be canceled by the Respondent, as the action was stayed by the undertaking.

According, on August 24, 2007, Joseph A. Altman, Esq., attended the foreclosure sale, and was shocked to learn that the Respondent, although acknowledging receipt of his August 20, 2007, letter, refused to cancel the sale.

Hence, at the Foreclosure sale of August 24, 2007, the potential bidders were advised by Joseph A. Altman, Esq., that the Petitioner had made the aforesaid undertaking and that the sale, by statute, was stayed.

Regardless, the Respondent proceeded with the sale, and the Petitioner's property was sold for $160,000.00, with the Respondent having chosen to ignore CPLR §5519(a)(2) and RPAPL §1341(2). Accordingly, the Petitioner timely filed a Notice of Appeal as to the order of Justice Renwick, which failed and refused to vacate and to set aside the judgment and sale.

REASONS FOR GRANTING THE PETITION

POINT I

WHERE THE PETITIONER COMPLIED WITH THE REQUIREMENTS SET FORTH IN RPAPL § 1341(2), THE TAKING OF ITS PROPERTY WAS WITHOUT DUE PROCESS OF LAW.

Here, the Petitioner, prior to the sale of the property, deposited into court the amount due the Respondent. As a result, the sale was stayed or should have been stayed pursuant to RPAPL 1341(2). Specifically, that section provides:

> Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:

. . . .

> 2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

There is no dispute here that the Petitioner made the proper deposit with the court so as to stay the sale. Moreover, the Respondent was fully aware, prior to the sale, that this deposit into court had been made and raised no objections thereto. In short, the Petitioner did all that it was required to do under the statute to obtain a stay of the sale. Nevertheless, the Court below incorrectly held that the proceedings were not stayed by statute, with the Respondent having then conducted the sale, in violation of the stay.

The Respondent has argued that the Petitioner was not entitled to a stay where the Petitioner failed to actually make a motion to stay the sale. The Petitioner acknowledges that there are a handful of cases suggesting that a defendant must make a motion for a stay, as well as depositing the funds into the court, to obtain the stay. *Green Point Sav. Bank v. Oppenheim*, 237 A.D.2d 409, 655 N.Y.S.2d 560 (2d Dep't 1997); *NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957, 763 N.Y.S.2d 836 (2d Dep't 2003). However, there is absolutely no language in the statute directing a defendant to actually apply to the court for a stay after depositing

the funds into the court. The statute clearly provides that the court will stay the sale where the defendant makes the proper deposit of funds into the court, as was done by the Petitioner here. In any event, had the Petitioner made the motion, prior to making the deposit, the result would have been the same, since the Petitioner would have deposited the same or a similar amount, and the Court would have granted the Stay.

One of the earlier cases that the later Courts cite, for the proposition that one must deposit funds with the Court and make a motion to stay in order to stop a foreclosure proceeding, is *Finance Inv. Co. v. Gossweiler*, 145 A.D.2d 463 (2d Dep't 1988). However, that case actually says, "RPAPL 1341 provides for a stay of all proceedings upon judgment if payment is made into the court after judgment directing the sale and before sale." The case does not say that a motion to stay is required to stop a foreclosure sale. *Gossweiler* is about whether the Court correctly granted the motion to stay, but the decision does not say that filing a motion to stay is necessary.

In *Green Point Sav. Bank v. Oppenheim*, 237 A.D.2d 409, 410 (2d Dep't 1997), the Court relied on *Gossweiler* to say that "the stay of proceedings pursuant to RPAPL § 1341(2) is not self-executing." It is important to note that the Court commented that the foreclosed owner "tendered payment at the eleventh hour," and as such the seller was probably not aware that the foreclosed owner redeemed his property.

Other related decisions also punish the owner for his "eleventh hour" conduct. In *Northwest Mtge. Inc. v. Brown*, 2006 NY Slip Op 9575, 2 (2d Dep't 2006), the Court notes that the fault lies "with the defendants, who waited until the last minute to seek relief."

Unlike the Defendants in *Oppenheim* and *Brown*, the Petitioner herein, 573 Jackson Avenue Realty Corp., did not wait until the last moment, as it notified the Respondent of the payment deposited to the Court at least four (4) days before the scheduled foreclosure sale. It is also worth pointing out that the herein Petitioner did not engage in "manipulation or gaming of the system." *Brown*, 2006 NY Slip Op 9575 at 2, citing *Glenbriar Co. v. Lipsman*, 5 N.Y.3d 388, 394 [Rosenblatt, J., concurring].

The statutory language of RPAPL § 1341 supports the conclusion that the foreclosed owner only must pay into the Court what is due, and the owner need not file a motion to stay. That section provides:

> Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:

> 2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

It is a general rule in the construction and interpretation of statutes that the intent of the Legislature is the primary object sought. *American Dock Co. v. New York*, 174 Misc. 813, 819 (N.Y. Sup Ct 1940), citing *Wiley v. Solvay Process Co.*, 215 N. Y. 584, 588 (N.Y. 1915) and *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 207 (N.Y. 1907). Generally courts do not favor a departure from literal construction. *American Dock Co.* at 819. The intent of the legislature "can ordinarily be determined from the words of the statute, by reading the statute literally and giving to its terms 'their usual, ordinary, and commonly accepted meaning.'" *People v. Herne*, 110 Misc. 2d 152, 155 (N.Y. County Ct. 1981) (internal citations omitted). "Where a statute is clear on its face and its words are possessed of a definite and precise meaning, resort to extrinsic matter, such as legislative history, is inappropriate." *Allstate Ins. Co. v. Libow*, 106 A.D.2d 110, 114 (2d Dep't 1984). The meaning of a statute must "be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms. *Caminetti v. United States*, 242 U.S. 470, 485 (U.S. 1917); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*,

548 U.S. 291, 297 (U.S. 2006). When the "language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti* at 485. Some Circuit Courts advocate for the use of external aids under all circumstances. *State Water Control Bd. v. Train*, 559 F.2d 921, 924 (4th Cir 1977). Nonetheless, the Supreme Court clearly favors the "plain meaning rule" of statutory interpretation. In the present case, the statute is not ambiguous, and it says that the foreclosed owner shall make a payment to the Court, and the Court then may dismiss the proceeding or stay the proceedings. The statute does not say that the foreclosed owner must file either of these motions.

In addition, it is well established that, "[i]n the absence of fraud, collusion, mistake, or misconduct . . . a court is without discretion to set aside a sale of foreclosure unless the requirements of RPAPL § 1341 are met." *NYCTL 1996-1 Trust*, 307 A.D.2d at 959, 763 N.Y.S.2d at 837. The requirements of RPAPL § 1341 were met in the case at hand. That statute simply mandates that the defendant "pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any." This is exactly what occurred here.

Assuming, *arguendo*, that the Petitioner was required to actually make a motion to stay, in order to prompt the lower court to stay the sale, the Petitioner still technically met all the requirements of

the statute where that statute, by its clear terms, only required the Petitioner/Defendant to make the proper payment into the court. Thus, the lower court, even if it did not initially stay the sale, was entitled, pursuant to the Petitioner's post sale motion, to set aside the sale, and to vacate the sale. A court may set aside the sale where "the requirements of RPAPL § 1341 are met." These requirements were satisfied here. Therefore, the lower court's statement in its Decision/Order denying the Defendant's Motion to Vacate the Sale, that "Defendant failed to follow the redemption procedures as set forth in RPAPL § 1341," was flatly incorrect.

In refusing to consider that the Defendant had met the redemption requirements for RPAPL § 1341(2), the lower court also erroneously concluded that in order for the statute to operate "the undertaking that must be deposited with the court must be in an amount fixed by the Court. In making this statement, the lower court erroneously relied on CPLR § 5519(a)(6), which does require a court-ordered undertaking. However, there is absolutely nothing in RPAPL § 1341, or the cases interpreting it, that requires a defendant to first have the court fix the amount to be paid into the court. The statute simply requires that the defendant "pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any." There is no requirement that prior to making this payment, the defendant first petition to the court

to set the amount to be paid. Here, the Petitioner paid $19,563.77 into the court, which was the exact amount the Respondent itself stated was owed. This amount fully covered "the amount due for principal and interest and the (legal fees) costs of the action, together with the expenses of the proceedings to sell, if any."

In short, the Petitioner clearly met the requirements of RPAPL § 1341(2) when it paid the proper amount into the court. There is nothing in the language of the statute even suggesting that a Petitioner must also make a motion for a stay, with the court to fix the amount to be deposited. The Petitioner was in full compliance with the statute after paying the proper amount into the court. As such, the proceedings/sale was stayed or should have been stayed by statute. However, even if the Petitioner's failure to make an affirmative motion for a stay was fatal to it procuring an initial stay, the lower court was still empowered to set aside the sale upon the Petitioner's full compliance with the statute and subsequent motion to vacate the sale.

POINT II

WHERE THE RESPONDENT FRAUDULENTLY INDUCED THE PETITIONER INTO BELIEVING THAT THE SALE HAD BEEN STAYED, THIS RESULTED IN THE TAKING OF THE PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.

As set forth above, it is well established that, "[i]n the absence of fraud, collusion, mistake, or misconduct . . . a court is without discretion to set aside a sale of foreclosure unless the requirements of RPAPL § 1341 are met." *NYCTL 1996-1 Trust*, 307 A.D.2d at 959, 763 N.Y.S.2d at 837; *see also Bankers Fed. Sav. & Loan Ass'n v. House*, 182 A.D.2d 602, 581 N.Y.S.2d 858 (2d Dep't 1992). Putting aside the fact that the Petitioner complied with the requirements of RPAPL § 1341 here, the lower court still should have set aside the sale where the Defendant, as a result of the Plaintiff's non-objections and silence, was justifiably lulled into believing that the sale had been stayed.

After receiving the Petitioner's August 20, 2007 written notification that the statutory amount had been paid into the court, the Petitioner made no objections and remained silent. As a result of this conduct, or "inaction", the Petitioner was justifiably misled into believing that the Petitioner would not proceed with the sale and that the sale, for all intents and purposes, had been stayed pursuant to the statute. Naturally, the Respondent should have

objected, or at least responded, to the Petitioner's August 20, 2007 written notification, if it was refusing to halt the sale. The Respondent's misconduct, in this respect, which arguably amounted to a fraud by silence, warranted the lower court setting aside the sale even if the *requirements of RPAPL § 1341 had not been met. See Home Owners Loan Corp. v. Vangerow*, 277 A.D. 774, 96 N.Y.S.2d 861 (2d Dep't 1950) (where it appeared that before a sale in a mortgage foreclosure action the mortgagor had produced a purchaser who was willing to purchase the property for a price almost double the amount bid at the sale, and it further appeared that the mortgagor had grounds for belief that if she produced such a purchaser, who would make a satisfactory payment upon signing of a contract to purchase the property, then the foreclosure sale would be postponed, and the mortgagor's motion to vacate the sale and for a resale upon terms should have been granted, though no fraud was alleged); *see also Comm'l Bank v. Catto*, 13 A.D. 608, 43 N.Y.S. 777 (4th Dep't 1897) (court setting aside a foreclosure sale where, before the sale, the owner appealed from the judgment of foreclosure and served an undertaking which he believed to be sufficient to stay proceedings, but which was defective in form).

POINT III

THE JUDGMENT OF FORECLOSURE AND SALE WAS TANTAMOUNT TO A JUDGMENT/ORDER DIRECTING THE "PAYMENT OF A SUM OF MONEY" UNDER CPLR § 5519(A)(2), WITH THE PETITIONER'S PROPERTY THEREBY PERMITTED TO BE TAKEN WITHOUT DUE PROCESS OF LAW.

The Petitioner's action of paying the proper amount into the court (an undertaking in the amount of the money judgment) was sufficient to procure a stay without a court order under CPLR § 5519(a)(2). That section provides:

> (a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:
>
> . . . ;
>
> 2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it

> as to which the judgment or order is affirmed[.]

The key to triggering CPLR § 5519(a)(2) here is establishing that the judgment of foreclosure and sale procured by the Plaintiff was a "judgment or order direct[ing] the payment of a sum of money," as that language is used in the statute. The lower court erred in finding that the judgment of foreclosure and sale was not tantamount to a judgment or order directing "the payment of a sum of money" or a money judgment. Hence, the Petitioner's property was taken without due process of law as it was based upon the misapplication of the law.

Here, and as with any judgment of foreclosure and sale, the judgment certainly ordered that the real property at issue should be sold. However, the judgment did more than this. In addition to this order of sale, the judgment also found that the Petitioner owed monies to the Respondent (as result of the Respondent's purchase of the tax lien). The judgment further fixed the exact amount of monies which were owed to the Respondent. The judgment had the effect of giving the Respondent a fixed-money judgment, which judgment it could attempt to satisfy with a sale of the property. It is certainly not unusual for a Respondent to attempt to satisfy a money judgment through the sale of the Petitioner's real property. The judgment also entitled the Petitioner to recover a deficiency judgment against the Petitioner if the sale proceeds did not fully cover the money judgment owed to the Respondent.

The lower court erred in narrowly interpreting CPLR § 5519(a)(2) so as to exclude the judgment of foreclosure and sale. *In re Estate of Scott*, 125 Misc. 2d 1024, 480 N.Y.S.2d 1018 (Sur. Ct. Monroe County 1984) (court holding that a judgment of foreclosure for the nonpayment of taxes should not be excluded from CPLR 5208 because that statute pertained to "money judgment"). The judgment of foreclosure and sale here had the effect of establishing and ordering that the Petitioner owed a specific amount of money to the Respondent as a result of the tax lien held by the Respondent. The fact that the judgment also specified that the real property should be sold to help satisfy the monies owed by the Petitioner to the Respondent did not take away from that fact that it was the judgment that was essentially a money judgment, or at least an order directing "the payment of a sum of money" under CPLR § 5519(a)(2). Hence, once again, although the statutes supported the actions of the Petitioner, the Petitioner's property was taken, without due process of the law.

POINT IV

PETITIONER'S MOTION TO VACATE THE SALE, WHERE CPLR § 5519(A)(6), ASSUMING IT APPLIED, WAS ALSO SATISFIED, BUT THE PETITIONER'S PROPERTY WAS NEVERTHELESS TAKEN WITHOUT DUE PROCESS OF LAW.

Both the lower court and the Respondent maintained that the Petitioner if it was seeking a stay of the sale without a court order, should have proceeded under CPLR § 5519(a)(6). That statutory section applies when "the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered." Here, the judgment of foreclosure and sale did not, as, for example, in an action for specific performance, direct that the real property be conveyed or delivered. Rather, the judgment of foreclosure and sale ordered, in part, a sale of the property to help satisfy the monies owed by the Petitioner to the Respondent. However, even assuming that CPLR § 5519(a)(6) did apply here, it was nevertheless satisfied after the Defendant deposited the substantial funds into the court.

The lower court and the Respondent focus on the language of the statute requiring "an undertaking in a sum fixed by the court." Here, the lower court did not technically fix an undertaking. However, this failure should not deprive the Petitioner of the benefits of the statute where the Petitioner certainly gave a sufficient undertaking by paying the

$19,563.77 into the court. Any undertaking fixed by the court under CPLR § 5519(a)(6) will be in an amount so "that the Petitioner or moving party will not commit or suffer to be committed any waste." If the court had fixed an undertaking here, it would have likely been less than the amount actually paid by the Petitioner into the Court. Thus, to assert that the Petitioner was not entitled to the benefits of CPLR § 5519(a)(6) merely because no undertaking was fixed by the court, makes little sense when one considers that the Petitioner gave a voluntary undertaking in an amount which likely exceeded any amount which would have been fixed by the lower court.

If the lower court and the Respondent are correct in maintaining that the Petitioner should have proceeded under CPLR § 5519(a)(6), then the Petitioner logically suggests that it satisfied this statute by its payment of a sufficient undertaking. As such, the Petitioner was entitled to the stay without court order under CPLR § 5519(a)(6) as well.

POINT V

A JUDGMENT OF FORECLOSURE, ENTERED WITHOUT NOTICE AND WHICH IS BASED UPON A SUM PREVIOUSLY PAID AND INCLUDES UNREASONABLE LEGAL FEES MUST BE SET ASIDE AND VACATED, AS THE PETITIONER WAS DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

SUMMARY OF EVENTS WHICH EVIDENCE THE JUDGMENT OF THE FORECLOSURE IS EXCESSIVE AND MUST BE VACATED AND SET ASIDE.

(i) That at no time did the Respondent reject the Petitioner's pre-action payment of the sum of $2,412.75, the original sum due and owing, at the time of the issuance of the tax lien certificate.

(ii) That the Respondent admits to having received this sum on April 9, 2002, which was prior to the commencement of this action, on January 29, 2004 and the prior action on October 22, 2002, wherein the 1st action was dismissed, as to this Respondent on December 10, 2003.

(iii) That the Respondent admits to failing to advise the Petitioner, after receipt of the payment of $2,412.75, that said sum was being accepted without prejudice.

(iv) That the Referee proceeded to his finding of $3,309.72, due and owing without any notice to the Petitioner, and without enabling the Petitioner to produce proof of payment and that the $3,309.72 was calculated in error, with CPLR § 4313 violated, since no notice of the time and place of the hearing was provided to the Defendant.

(v) Respondent, having chosen to foreclose on the tax lien certificate, one year post-sale, did not produce proper proof of an entitlement to the payment of the sum of $9,307.50 in legal fees. Specifically, the alleged billing was not proved nor provided, as is required, *Lazich v. Lazich*, 189 A.D.2d. 750, 752 (2nd Dept. 1983), with it an improper exercise of discretion to award legal [counsel fees] where there is no supporting documentation, but merely by a summary of the types of work performed and the related fees.

(vi) An award of legal fees is not supported by statute, as legal fees are payable only to the municipality, should it foreclose on the lien, not if it was sold and then assigned to a private party, as is the case herein.

This case presents several important issues, to wit: the interpretation of two (2) fundamental statutes, which (on these facts) provided for an immediate statutory stay—as well as vacature of the Judgment of Foreclosure, since it is for an amount already paid and which includes unreason-

able costs and legal fees. Regardless, the court's interpretation has led to the taking of the Petitioner's property, without due process of law, since the New York State Statutes does not provide for such unconscionable relief.

This case presents an issue of public importance worthy of review by this court; to what degree could the Court below make a finding and determination which completely ignores the plain statutory interpretation of two (2) statutes, which then leads to the taking of the Petitioner's property without notice and without due process of law and in violation of the Fourteenth Amendment of the Constitution. Thus, the Petitioner asks that leave be granted with respect to its Petition.

CONCLUSION

Based on the foregoing, the writ should be granted.

Dated: Bronx, New York
March 15, 2010

Respectfully submitted,

LAURIE FOWLES, ESQ.
Attorney for Petitioner
573 Jackson Avenue Realty Corp.
Four Cottage Street
Medway, Massachusetts 02053
508-572-0475

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

Remittitur

NO. 201 COPY

NYCTL 1999-1 Trust et al.,

Respondents,

v.

573 Jackson Avenue Realty Corp.,

Appellant,

City of New York
Bureau of Highway Operations, et al.,

Defendants.

Appellant in the above entitled appeal appeared by Joseph A. Altman, P.C.; respondents appeared by Rosicki Rosicki & Associates, P.C.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Bronx County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

By: STUART M. COHEN
Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 15, 2009

[STATE SEAL]

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207

Decided December 15, 2009

No. 201

NYCTL 1999-1 Trust et al.,

Respondents,

v.

573 Jackson Avenue Realty Corp.,

Appellant,

City of New York
Bureau of Highway Operations, et al.,

Defendants.

Order affirmed, with costs.

Opinion by Judge Graffeo.

Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

STATE OF NEW YORK
COURT OF APPEALS

No. 201

NYCTL 1999-1 Trust et al.,

Respondents,

v.

573 Jackson Avenue Realty Corp.,

Appellant,

City of New York
Bureau of Highway Operations, et al.,

Defendants.

Joseph A. Altman, for appellant.
Owen M. Robinson, for respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

GRAFFEO, J.:

In this action to foreclose a real property tax lien, we conclude that the property owner did not properly stay the foreclosure sale nor did it exercise its

right to redeem. We therefore affirm the order of the Appellate Division.

Defendant 573 Jackson Avenue Realty Corp. (Jackson) failed to pay certain real property taxes on its property located in the Bronx. In May 1999, plaintiff NYCTL 1999-1 Trust (the Trust) acquired a tax lien against the property in the amount of $2,412.75 from the City of New York. Nearly three years later, Jackson paid that amount to the Trust. The lien was not discharged, however, because the statutory interest that had accrued in the interim remained unpaid.

The Trust and the Bank of New York, as collateral agent and custodian for the Trust, then commenced this action against Jackson to recover the balance owed, including interest and attorneys' fees. Following motion practice not relevant here, Supreme Court granted summary judgment in favor of the Trust and appointed a referee to calculate the total amount owed. After the referee's report was issued, the Trust moved to confirm the report and sought a judgment foreclosing the tax lien. Supreme Court granted the motion and awarded the Trust $9,307.50 in attorneys' fees, finding that such an award was reasonable given that the fees "became so grossly disproportionate to the amount of potential recovery only after [Jackson] chose to advance and repeat its unavailing arguments which had been decided by the Court in its previous Orders." A judgment of foreclosure and sale was entered in May 2007. Jackson appealed the judgment, arguing that it was improperly calculated.

Meanwhile, a foreclosure sale was scheduled for August 24, 2007. Approximately a week before the sale, the Trust forwarded a payoff letter to Jackson indicating that the sum of $19,070.74 could be paid to redeem the property prior to the sale. Instead of forwarding full payment to the Trust, Jackson deposited $19,563.77 with the Bronx County Clerk on August 17, 2007. The transmittal certificate reflects that the purpose of the deposit was "to be determined" and that the persons to be benefitted likewise were "to be determined." The day before the scheduled sale, the Trust received correspondence from Jackson stating that it had filed an undertaking with the County Clerk that "stayed" the foreclosure sale. The sale proceeded as planned and a third party bought the parcel with a high bid of $160,000.

In September 2007, Jackson moved to cancel the foreclosure sale and enjoin the referee from conveying title because the property had been sold in violation of statutory stays afforded by CPLR 5519 and RPAPL 1341. Supreme Court denied the motion. The Appellate Division affirmed both the foreclosure judgment and Supreme Court's denial of the motion (55 AD3d 454 [1st Dept 2008]), and we granted Jackson leave to appeal (12 NY3d 715 [2009]).

Jackson maintains that its appeal from the May 2007 judgment of foreclosure coupled with its August 2007 deposit with the County Clerk automatically stayed the sale under CPLR 5519(a)(2) and (6). But CPLR 5519(a)(2) is relevant only where "the judgment or order directs the payment

of the sum of money" and has no application to an appeal from a judgment of foreclosure and sale. Similarly, Jackson's reliance on CPLR 5519(a)(6) is unavailing given that its undertaking was not "in a sum fixed by the court" as required by that provision.

Alternatively, Jackson submits that the foreclosure sale was improper because a stay was obtained pursuant to RPAPL 1341, which provides in relevant part:

> "Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:
>
> . . .
>
> "2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal and interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due."

The Appellate Division concluded that Jackson did not properly secure a stay under RPAPL 1341 because that provision is not self-executing and

requires that a court order the stay. We reject Jackson's argument for a more fundamental reason—RPAPL 1341 simply has no application here.

RPAPL 1341 authorizes a stay when the property owner pays a sufficient amount into court in situations "[w]here an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, *and another portion of either is to become due*" (emphasis added). In typical mortgage foreclosure cases, after a default, the entire balance is accelerated and immediately due. No portion "is to become due" in the future. Because future payments are anticipated only in the context of partial mortgage foreclosures (*see* RPAPL 1351 [2]), it follows that RPAPL 1341, by its plain terms, is limited to partial foreclosures (*see* 1 Bergman on New York Mortgage Foreclosures § 4.07[1], at 4-46 [2009] ["While that provision does address the concept of redemption, a careful reading of RPAPL section 1341 reveals its application solely to the instance where the entire amount of the mortgage has not yet become due. In short, that section applies to the partial foreclosure situation."]). Since this action to foreclose the Trust's tax lien does not involve a partial foreclosure, RPAPL 1341 is inapplicable.

Although RPAPL 1341 does not apply outside the partial foreclosure context, we note that a number of recent Appellate Division cases have engrafted that statute's requirements onto a property owner's common-law right of redemption (*see e.g. NYCTL 1996-1 Trust v LFJ Realty Corp.*, 307 AD2d 957 [2d Dept 2003], *lv dismissed* 1 NY3d 622 [2004]; *EMC*

Mtge. Corp. v Bobb, 296 AD2d 476 [2d Dept 2002]; *Green Point Sav. Bank v Oppenheim*, 237 AD2d 409 [2d Dept 1997], *lv denied* 90 NY2d 806 [1997]). The equity of redemption, which long predates the RPAPL, allows property owners to redeem their property by tendering the full sum at any point before the property is actually sold at a foreclosure sale (*see Mackenna v Fidelity Trust Co. of Buffalo*, 184 NY 411, 416 [1906]; *Nutt v Cuming*, 155 NY 309, 313 [1898]; *Nelson v Loder*, 132 NY 288, 291-292 [1892]; *see also* 1 Bergman on New York Mortgage Foreclosures § 4.07, at 4-42.2 [2009]). To the extent *LFJ*, *EMC* and *Green Point* suggest that a property owner must comply with RPAPL 1341's requirements—including a motion for a stay and a sum deposited with the court—as preconditions for redemption, those cases should not be followed. An unconditional tender of the full amount due is all that is required.

Here, Jackson has conceded that it only sought to stay the sale through its deposit of $19,563.77 with the County Clerk and that it did not tender the sum to the Trust. The record confirms that no tender was made—the documentation associated with the deposit reveals that no particular purpose or person was identified at the time the funds were deposited. Similarly, Jackson notified the Trust that the deposit merely "stayed" the foreclosure sale; it did not claim that it had fully satisfied the outstanding debt. Hence, Jackson informed neither the court nor the Trust that it was making full pay-

ment to redeem the property.* Because Jackson did not redeem the property by unconditionally tendering the total amount owed, the parcel was properly sold at auction.

We have considered Jackson's remaining arguments, including those related to the propriety of the foreclosure judgment itself, and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Decided December 15, 2009

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* In fact, throughout this litigation, Jackson's posture has been that its conduct stayed the sale pending its appeal from the foreclosure judgment—a position that is inconsistent with the exercise of the equity of redemption.

MEMORANDUM ORDER

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4397-4397A Index 27686/02

NYCTL 1999-1 Trust et al.,

Plaintiffs-Respondents,

v.

573 Jackson Avenue Realty Corp.,

Defendant-Appellant,

City of New York
Bureau of Highway Operations, et al.,

Defendants.

Joseph A. Altman, Bronx, for appellant.

Rosicki Rosicki & Associates, P.C., Plainview (Owen M. Robinson of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered May 24, 2007, granting foreclosure of a tax lien and directing sale of real property, and order, same court and Justice, entered on or about December 7, 2007, which denied defendant 573 Jackson Avenue Realty's

motion to vacate the foreclosure sale, unanimously affirmed, without costs.

After much litigation, Jackson Avenue Realty deposited with the court the payoff amount demanded by plaintiffs a few days before the scheduled foreclosure sale, and then notified plaintiffs of the payment and asserted that the sale was stayed "per statute." The sale proceeded nonetheless, and the property was sold to a third party.

In a foreclosure action where the defendant pays into court the amount due for principal, interest and costs of the action, together with the expenses of the proceeding to sell, the court is required to dismiss the complaint and stay all proceedings on the judgment (RPAPL 1341), without regard to discretionary interpretation or application (*Gabriel v 351 St. Nicholas Equities*, 168 AD2d 338, 339 [1990]). However, a stay of proceedings under this statute is not self-executing; it requires a motion (*see Green Point Sav. Bank v Oppenheim*, 237 AD2d 409, 410 [1997], *lv denied* 90 NY2d 806 [1997]). Jackson Avenue Realty failed to make such a motion, and its deposit of the amount demanded by plaintiffs did not qualify as an undertaking since it was not reviewed or fixed by the court (CPLR 5519[a][4], [6]).

There is no evidence of fraud or other misconduct on plaintiffs' part in failing to advise Jackson Avenue Realty that the sale would proceed despite the latter's payment into court. Absent a confidential or fiduciary relationship, there is no duty to disclose, and mere silence, without identifying some act of deception, does not constitute a con-

cealment actionable as fraud (*see Mobil Oil Corp. v Joshi*, 202 AD2d 318 [1994]).

The attorneys' fee award had ample support in the record.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 28, 2008

/s/ [ILLEGIBLE]
CLERK

NEW YORK SUPREME COURT —
COUNTY OF BRONX

PART / C

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

————————————X

NYCTL 1996-1 Index No. 27686/02

Hon. [STAMPED]
against DIANNE T. RENWICK
Justice.

573 JACKSON AVE. et al.

————————————X

The following papers, numbered 1 to 4 Read on this motion.
Noticed on 9/10/07 and duly submitted as No. 10 on the Motion Calendar of 9/10/07.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

	PAPERS NUMBERED	
Notice of Motion–Order to Show Cause–Exhibits and Affidavits Annexed		
Answering Affidavits and Exhibits		
Replying Affidavit		
_____ Affidavits and Exhibits		
Pleadings–Exhibit		
Stipulation(s)–Referee's Report–Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED AS PER ATTACHED DECISION AND ORDER.

Dated: 11/30/07

[SIGNED INITIAL, STAMPED NAME]

Hon. DIANNE T. RENWICK

J.S.C.

DIANNE T. RENWICK

Filed On – 12/7/2007 9:58:07

SUPREME COURT
OF THE
STATE OF NEW YORK
COUNTY OF BRONX: PART IA-1

Index No.: 27686/02
On September 10, 2007

NYCTL 1996-1 TRUST and
THE BANK OF NEW YORK,
as Collateral Agent and Custodian
for the NYCTL 1996-1 TRUST,

Plaintiff,

—against—

573 JACKSON AVENUE REALTY CORP.;
CITY OF NEW YORK BUREAU OF HIGHWAY
OPERATIONS, NEW YORK STATE DEPART-
MENT OF TAXATION AND FINANCE, NEW
YORK CITY DEPARTMENT OF FINANCE, NEW
YORK CITY TRANSIT ADJUDICATION
BUREAU, THE PEOPLE OF THE STATE OF
NEW YORK, UNITED STATES OF AMERICA,

Defendant(s).

Present:

Hon. Dianne T. Renwick
Justice of the Supreme Court

DECISION/ORDER

The following documents were considered in reviewing defendant 573 Jackson Ave. Realty Corp.'s Order to Show Cause seeking, inter alia, to vacate a foreclosure:

Papers	Numbered
Defendant's Order to Show Cause, Affirmation	1, 2 (Exhibits)
Plaintiff's Affirmation in Opposition	3
Defendant's Reply Affirmation in Support	4

Defendant 573 Jackson Ave. Realty Corp. brings this Order to Show Cause seeking to cancel the foreclosure sale conducted on August 24, 2007, prevent the referee from conveying a deed to the property, and assessing the sum of $2,500.00 in legal fees against the Plaintiff, alleging that Plaintiff violated the statutory stay.

Previously in this case, defendant successfully petitioned the court to open a default judgment. Once the default was opened, plaintiff was granted summary judgment, which defendant unsuccessfully sought to reargue. Subsequently, on August 16, 2007, defendant received a payoff letter from plaintiff by facsimile. The letter indicated the amount defendant would have to pay prior to the August 24, 2007 scheduled sale of the property, in order to satisfy the debt and stop the sale.

On August 17, 2007, defendant deposited $19,563.77 with the Bronx County Clerk's Office. On August 20, 2007, defendant notified plaintiff by

mailing to plaintiff a letter and a copy of the County Clerk's receipt of payment. (Plaintiff contends that defendant mailed the documents to an address he knew was no longer correct). Plaintiff received the letter and mailed receipt on August 23, 2007, the afternoon before the foreclosure auction. The letter stated that an undertaking had been filed with the Clerk of the Court, Bronx County, in the sum of $19,563.77, which was the payoff amount indicated on plaintiff's faxed letter to defendant. Defendant further stated that the foreclosure had been stayed as per statute. Defendant did not enclose a copy of a court order staying the action; defendant merely asserted that the action had been stayed. Plaintiff disregarded defendant's letter and went ahead with the sale the next day, selling the property to a third party at auction.

DISCUSSION

Defendant relies on CPLR § 5519(a)(2) as proof that a stay of foreclosure had been obtained and that plaintiff's foreclosure sale was in violation of the stay. Defendant's position is untenable as a matter of law. Defendant's reliance upon CPLR 5519(2) is misplaced. CPLR 5519(a)(2) provides that a stay of execution of a monetary judgment is available, without a court order. This action, however, did not seek a money judgment. Instead, the action was brought to foreclose upon a tax lien.

Instead, as plaintiff notes, defendant should have sought relief under CPLR § 5519(a)(6) which states that a party may obtain a stay without a

court order where they have served a notice of appeal or an affidavit of intention to move for permission to appeal on their adversary and:

> the . . . moving party is in possession . . . of real property which the judgment . . . directs be conveyed . . . , and an undertaking in a sum fixed by the court of original instance is given . . .

Unfortunately, defendant has failed to satisfy the requirements of § 5519(a)(6). In order to satisfy this section, defendant needed to obtain "an undertaking in a sum fixed by the court." Id. Instead, as stated above, defendant merely deposited the payoff amount without any direction from the court. Thus, the undertaking defendant deposited did not satisfy § 5519(a)(6) and defendant failed to correctly apply and satisfy the requirements of § 5519(a)(6).

Defendant also asserts that it satisfied the redemption requirements for RPAPL § 1341(2). This section reads, in pertinent part:

> Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:

> 2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

The two sections, CPLR § 5519(a)(6) and RPAPL § 1341(2) work together. The undertaking that must be deposited with the court must be in an amount fixed by the Court. No court ordered undertaking had been obtained in this case. Defendant deposited the $19,563.77 amount based on the payoff letter faxed by plaintiff, not pursuant to a court ordered undertaking. Defendant's actions do not comport with the requirements for a statutory stay. Thus, the foreclosure sale was not in violation of a foreclosure stay, as no stay was obtained.

Since the foreclosure sale was properly conducted, the question remaining is whether it should be set aside nevertheless. Courts may exercise wide discretion in setting aside "a judicial sale upon a showing of fraud, mistake, surprise or another act that casts an aura of suspicion over the sale." *Crossland Mortgage Corp. v. Frankel*, 192 A.D.2d 571 (2d Dept. 1993). However, where a sale is regular, courts avoid setting aside a judicial sale solely on the grounds of mistake and where the mistake is due to a party's own negligence, vacating a sale is unwarranted. *Id.*; *cf. McCotter v. Jay*, 30 N.Y. 80 (1864). A court must use its power to nullify sales cautiously because of the strong pub-

lic policy in favor of the public's confidence in the validity and enforceability of judicial sales in addition to promoting stable title to real property. *See McCotter v. Jay, supra*; *Hammerman v. Ferguson*, 50 A.D.2d 853 (2d Dept. 1975).

Further, "a court is without discretion to set aside a sale of foreclosure unless the requirements of RPAPL 1341 are met . . . [and failure to] follow the redemption procedures set forth in RPAPL preclude invalidation of the sale." *NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957, 959 (2d Dept. 2003) *see Green Point Savings Bank v. Oppenheim*, 237 A.D.2d 409 (2d Dept. 1997); *Crossland Mortgage Corp. v. Frankel, supra*; *Long Is. Sav. Bank of Centereach v. Jean Valiquette*, M.D., P.C., 183 A.D.2d 877 (2d Dept. 1992). Here, defendant failed to follow the redemption procedures as set forth in RPAPL 1341 including failing to obtain a statutory stay. Accordingly, this Court exercises its discretion not to invalidate the foreclosure sale. Therefore, defendant's motion is denied in its entirety.

For the foregoing reasons, it is hereby

ORDERED that Defendant's motion to vacate a foreclosure sale is denied in its entirety.

Dated: November 30, 2007
Bronx, New York

/s/ DIANNE T. RENWICK
Hon. Dianne T. Renwick, J.S.C.

At an IAS Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of BRONX, at the Courthouse thereof located at 851 Grand Concourse, Bronx, New York 10451 on the 18th day of Sept., 2006.

PRESENT: [STAMPED]
DIANNE T. RENWICK

HON. ~~Bertram Katz~~
Justice.

Index No. 27686/02

NYCTL 1999-1 TRUST AND
THE BANK OF NEW YORK
AS COLLATERAL AGENT AND CUSTODIAN
FOR THE NYCTL 1999-1 TRUST,

Plaintiffs,

—against—

573 JACKSON AVENUE REALTY CORP.;
CITY OF NEW YORK BUREAU OF HIGHWAY
OPERATIONS; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE;
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU; PEOPLE OF THE STATE OF NEW
YORK; CITY OF NEW YORK;
UNITED STATES OF AMERICA;

Defendants.

[STAMP]
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BRONX COUNTY

JUDGMENT OF FORECLOSURE AND SALE

Upon the Notice of Motion dated March 30, 2006; and the reading of the Affirmation of Margaret Burke Tarab, Esq., attorney for Plaintiff, signed on March 30, 2006; on the Summons, Verified Complaint and Notice of Pendency of Action heretofore filed with the Clerk of this Court, the Affidavits of Service of the Summons and Verified Complaint, upon all of the defendants, all of which were duly filed with the Clerk of the Court, and more particularly referred to in the Affirmation of Regularity of Karen Riedy, signed on December 17, 2004 from which Affirmation it appears that this is an action to foreclose a tax lien upon real property situate within the territorial jurisdiction of this Court; that the whole amount thereon, as alleged in the Verified Complaint, is presently due and owing, with interest thereon, as therein alleged; and upon the prior Order of this Court appointing a Referee to ascertain and compute the amount due to Plaintiffs, and to examine and report whether the premises can be sold in one parcel, by which report, duly filed simultaneously herewith, the said Referee has reported that the sum of $3,309.72 is due and owing to Plaintiffs as of March 3, 2006; and that

the premises should be sold in one parcel; that the time for each and all of the defendants to answer or move with respect to the Complaint has expired and that the same has not been extended; that none of the defendants is an infant, incompetent or absentee, and that all defendants are in default except 573 Jackson Avenue Realty Corp., who interpreted an answer to the complaint which was stricken by Order Granting Summary Judgment dated January 5; 2006 and entered January 11, 2006; and the same having regularly come on to be heard before this Court, now after due deliberation having been had;

NOW, on motion of ROSICKI, ROSICKI & ASSOCIATES, P.C., attorneys for Plaintiffs, it is

ORDERED, ADJUDGED AND DECREED, that the motion be and the same is hereby in all respects granted and that the report of the Referee is hereby confirmed; and it is further

ORDERED, ADJUDGED AND DECREED, that the premises described in the Verified Complaint, as hereinafter described, be sold in one parcel, subject to any zoning restrictions and any amendments thereto, according to law, and now in force; subject to the state of facts an accurate survey may show; covenants, restrictions, agreements, reservations and easements of record, if any, and to any and all violations thereof; any and all building and zoning regulations, restrictions and ordinances of the municipality in which said premises are located, and violations of same, including, but not limited to, reapportionment of lot lines, and vault

charges, if any; any and all orders or requirements issued by any governmental body having jurisdiction against or affecting said premises and violations of the same; the physical condition of any buildings or structure on the premises as the date of sale hereunder; rights of tenants or occupants in possession, if any; rights of any defendants pursuant to CPLR 317, 2003 and 5015, if any; and other conditions as set forth in the terms of sale more particularly to be announced at sale; rights of any defendants pursuant to CPLR 317, 2003 and 5015, if any; any sale to be held hereunder will be subject to the rights of the United States of America to redeem, if any; at public auction at The Bronx County Courthouse, 851 Grand Concourse, Room B129, Bronx, New York at 2:00 PM on any weekday except Thursdays, by and under the direction of Joseph Jednak who is hereby appointed Referee for that purpose; that said Referee give public notice of the time and place of said sale according to law and the practice of this Court in the New York Law Journal and The Riverdale Press, that the Plaintiffs or any other party to this action may become the purchaser at such sale; that in the event the Plaintiffs shall become the purchaser at said sale, it shall not be required to make any deposit thereon; that said Referee execute to the purchaser or purchasers on such sale a deed or deeds of the premises sold; ~~that all deed stamps, transfer taxes and recording fees, if any, shall be paid by the purchaser~~; if the property is located within the five boroughs of New York City, that the Referee on receiving the proceeds of sale shall forthwith pay

therefrom the taxes, assessments, water rates and sewer rents or environmental liens which are or may become liens on the premises as of the date of sale with such interest or penalties which may lawfully have accrued thereon to the day of payment provided, ~~however, that none of aforesaid charges shall be allowed out of the proceeds unless~~

ORDERED, ADJUDGED AND DECREED, that the referee shall conduct the foreclosure sale only if plaintiff, its successors and/or assigns, or its representative is present at the sale ~~or the referee has received a written bid and Terms of Sale from plaintiff, its successors and/or assigns, or its representative;~~ and it is further

ORDERED, ADJUDGED AND DECREED, that in case the Plaintiffs be the purchaser of said premises at said sale, or in the event that the rights of the purchaser, or its assignee, at said sale and the terms of sale under this judgment shall be assigned to and be acquired by the Plaintiffs; and a valid assignment thereof filed with said Referee, said Referee shall not require the Plaintiffs to pay in cash the entire amount bid at said sale, but shall execute and deliver to the Plaintiffs a deed or deeds of the premises sold upon the payment to said Referee of the amounts specified above in items marked "FIRST" and "SECOND" and the amounts of the aforesaid taxes, assessments, water rents and sewer rents, and interest or penalties thereon, or in lieu of the payment of said last mentioned amount, upon filing with said Referee receipts of the proper municipal authorities showing the pay-

ment thereof; ~~or an affidavit by Plaintiffs setting forth that payment has been made; provided, however Plaintiffs shall not be required to pay said taxes, assessments, water rents and sewer rents, unless same are due and payable on the date of sale, or any adjourned date thereof, irrespective of the date upon which same have become or may be a lien upon the said premises;~~ that the balance of the amount bid, after deduction therefrom of the aforesaid amounts paid by the Plaintiffs for Referee's fees, advertising expenses and taxes, assessments, water rents and sewer rents, shall be allowed to the Plaintiffs and applied by the Referee upon the amounts due to the Plaintiffs as specified above in items marked "THIRD" and "FOURTH"; that if, after so applying the balance of the amount bid, there shall be a surplus over and above the said amounts due to the Plaintiffs, the Plaintiffs shall pay to the Referee upon delivery to it of the said Referee's deed, the amount of such surplus; that the Referee on receiving said amounts from the Plaintiffs shall forthwith pay therefrom said taxes, assessments, water rents, sewer rents, and interest or penalties thereon, unless the same shall have already been paid, the Referee shall then deposit the balance in said depository as hereinabove directed; and it is further

ORDERED, ADJUDGED AND DECREED, that by accepting this appointment, the referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36),

including, but not limited to Section 36.2(c) ("Disqualification from Appointment") and Section 36.2(d) ("Limitations on Appointments Based on Compensation"); and it is further

ORDERED, ADJUDGED AND DECREED, that said Referee take the receipts for the money so paid out by him, and file it with his Report of Sale; that he deposit the surplus monies, if any, with the Bronx County Clerk within five days after the same shall be received and be ascertainable, to the credit of this action, to be withdrawn only on the Order of this Court, signed by a ~~Judge~~Justice thereof; that the Referee shall make a report of such sale and file it with the Clerk of the County in which this action is pending ~~with all convenient speed;~~ within 30 days after completing the sale and executing the proper conveyance to the purchase; and it is further

ORDERED, ADJUDGED AND DECREED, that if the proceeds of such sale be insufficient to pay the amount so reported due to the Plaintiffs with the expenses of the sale, ~~same shall have been due and payable on the date of sale;~~ that the Referee then deposit the balance of the proceeds of this sale in his own name as Referee in Chase Manhattan Bank and shall thereafter make the following payments and his checks for that purpose shall be paid by the said depository, to wit:

FIRST: He shall pay a sum not exceeding $500.00, the amount allowed by CPLR 8003, to the said Referee as his fee herein

SECOND: He shall pay the expenses of the sale and advertising expenses as shown on bills presented and certified by the said Referee to be correct.

THIRD: He shall pay to Plaintiffs or his attorneys the sum of $3,309.72, being the amount due as aforesaid, together with interest ~~to the date of the sale directed herein or to the date or the delivery of the Referee's Deed, whichever is later,~~ contracted from March 4, 2006 to the date of entering this judgment with legal interest thereafter, or so much thereof as the purchase money will pay of the same.

FOURTH: He shall pay the sum of $ 1,545.00 , as taxed by the Clerk of the Court and hereby adjudged to the Plaintiffs for costs and disbursements in this action, ~~with interest thereon from the date hereof,~~ together such advances as the Plaintiffs shall have made for other expenses incurred, if any, with interest at the contract rate thereon, together with an additional allowance of $ / , hereby awarded to Plaintiffs in addition to the costs and disbursements, ~~with interest thereon from the date hereof;~~ together with the sum of $ 9,307.50/00 as and for reasonable value of the attorneys' fees and expenses incurred by the Plaintiffs which sum shall be added to and made a part of the judgment herein; and it is further

advances, attorney's fees, interest, costs and allowances, as aforesaid, the Referee shall specify

the amount of such deficiency in his Report of Sale; and it is further

ORDERED, that the purchaser or purchasers at said sale be let into possession on production of the Referee's deed or deeds; and it is further

ORDERED, ADJUDGED AND DECREED, that, each and all of the defendants, in this action and all persons by, through or claiming under them or any or either of them, after the filing of the Notice of Pendency of this action, be and they hereby are forever barred and foreclosed of all right, claim, lien, title interest and equity of redemption in said tax lien premises, and each and every part thereof.

A description of the real property under foreclosure is annexed to this Judgment and made a part thereof as Schedule "A".

Said premises being known as and by street address: 573 Jackson Avenue, Bronx, New York, 10455; and bearing tax map designation: Block:2623 Lot: 172.

E N T E R

/s/ [SIGNED INITIAL]
J.S.C.

[STAMP] DIANNE T. RENWICK

/s/ HECTOR J. DIAZ
CLERK

MAY 24, 2007

SUPREME COURT
OF THE
STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 27686/02

NYCTL 1999-1 TRUST AND
THE BANK OF NEW YORK
AS COLLATERAL AGENT AND CUSTODIAN
FOR THE NYCTL 1999-1 TRUST,

Plaintiffs,

—against—

573 JACKSON AVENUE REALTY CORP., et al.,

Defendants.

COSTS OF PLAINTIFFS

Costs before Notes of Issue filed, CPLR 8201(1).....	$200.00
Additional Allowance by Statute CPLR 8302(a)(b):	
addl. (not exceeding $200)	
$200.00 at 10% $20.00	
addl. (not exceeding $800)	
$800.00 at 5%.....$40.00	
" (not exceeding $2000)	
$2000.00 at 2% $40.00	
" (not exceeding $5000)	
$5000.00 at 1% .....$50.00.....	$150.00

Additional Allowance by Statute
CPLR 8302(d): $50.00

FEES AND DISBURSEMENTS

Fee for Index Number and Filing
Lis Pendens, CPLR 8018(a)
8021(a)(12) $220.00

Paid for searches $250.00

Serving copy of summons and complaint
CPLR 8011(c), 8301(d) $1,650.00

Request for Judicial Intervention (2) ... $75.00

Referee's fee
(CPLR 8301(a)(1); 8003(a)) $250.00

Certified copy of judgment $5.00

Publication of
Supplemental Summons $00.00

Motion fees $180.00

Clerk's fee, filing amended
notice of pendency ..... $ .00

Total $1545.00

Taxed at $____ this ____ day of _____, 2006.

/s/ HECTOR J. DIAZ
Clerk

MAY 24, 2007

[STAMP] I hereby certify that I have adjusted this bill of costs at $ 1,545.00

MAY 24, 2007
Date

/s/ HECTOR J. DIAZ
Clerk

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

No. 09-1116

In The
Supreme Court of the United States

573 JACKSON AVENUE REALTY CORP.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK, as Collateral Agent and Custodian for the NYCTL 1999-1 Trust,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

BRIEF IN OPPOSITION

OWEN M. ROBINSON, ESQ.
ROSICKI, ROSICKI & ASSOCIATES, PC
Attorney for the Respondents NYCTL 1999-1 Trust and The Bank of New York, as Collateral Agent and Custodian for the NYCTL 1999-1 Trust
51 East Bethpage Road
Plainview, New York 11803
(516) 741-2585
orobinson@rosicki.com

Dated: May 17, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225 6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the undersigned attorney of record for Respondent ***NYCTL 1999-1 Trust and The Bank of New York, as Collateral Agent and Custodian for the NYCTL 1999-1 Trust (the "Respondent")*** hereby certifies that no parent, subsidiaries or affiliates exist with respect to NYCTL 1999-1 Trust and The Bank of New York Mellon (formerly known as The Bank of New York) is a wholly owned subsidiary of The Bank of New York Mellon Corporation which is a publicly held company.

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STATEMENT OF THE CASE

The underlying action is one to foreclose a tax lien on property located at 573 Jackson Avenue, Bronx, New York. The lien was originally held by the City of New York which subsequently transferred it to the plaintiff Trust. At the time of the conveyance to the Trust on May 24, 1999 the amount of the lien was $2,412.75. Tax liens accrue interest pursuant to statute at the rate of 18% compounded daily. On April 9, 2002, nearly three years after the sale of the tax lien, the Petitioner tendered a partial payment in the amount of $2,412.75 which was accepted by the Trust towards the full amount owed. There remained a balance of $1,640.15 on the account which consisted of 1,051 days of accrued interest at 18% compounded daily. The Petitioner has contended (unsuccessfully) throughout this foreclosure that its payment of the original principal balance of the tax lien 1,051 days after the tax lien was sold constitutes payment in full.

Prior to the foreclosure action which is the subject of this appeal, an action to foreclose the tax lien had been commenced in which the Petitioner was served with the summons and complaint by publishing same pursuant to a Court Order. The action proceeded and prior to the entry of a Judgment of Foreclosure and Sale, the Petitioner was successful in having the action dismissed as against it for failure to properly serve process and obtain jurisdiction over it.

The instant foreclosure action was then commenced against the Petitioner. The Petitioner was served with the summons and complaint and it interposed an answer with various affirmative defenses, including payment, that the plaintiff was seeking legal fees without basis, res judicata, collateral estoppel, waiver, accord and satisfaction. A motion for summary judgment was made and granted in plaintiff's favor disposing of all of the Petitioner's affirmative defenses, striking the answer and deeming it a notice of appearance requiring notice only of Notice of Sale, Notice of Surplus Proceedings and Notice of Discontinuance. Reargument ensued which was denied and an appeal was prosecuted in which the Appellate Division found that the prior dismissal had not been on the merits, that the Petitioner was not excused from the requirement of paying the statutorily assessed compound interest and that the Petitioner possessed no defenses to the foreclosure action. *NYCTL 1999-1 Trust v. 573 Jackson Ave. Realty Corp.*, 39 A.D.3d 267, 833 N.Y.S.2d 74 (1st Dept. 2007).

A referee was then appointed who reported the amount that he found to be due to the plaintiff, and an application was made to confirm the referee's report of amount due and for a Judgment of Foreclosure and Sale. The Petitioner opposed the motion. Justice Diane Renwick issued a Decision and Order granting plaintiff's application. In her Decision and Order, Justice Renwick observed that while plaintiff's request of an award of legal fees in the amount of $9,307.50 in the tax lien foreclosure "is not typically

fair and reasonable" given the fact that the original tax lien with interest was $3,309.72, she found "plaintiff's attorney's fees, here, to be fair and reasonable because they became grossly disproportionate to the amount of potential recovery, only after defendant 573 Corp. chose to advance and repeat its unavailing arguments which had been decided by the Court in its previous Orders". Justice Renwick granted plaintiff a Judgment of Foreclosure and Sale. The Petitioner filed and served a notice of appeal from the Judgment of Foreclosure and Sale.

Pursuant to the Judgment of Foreclosure and Sale, a sale was scheduled for August 24, 2008. Prior to the sale, a request was received for payoff figures from the attorney for the Petitioner. A payoff letter was prepared and forwarded to the Petitioner's attorney. Based upon the payoff letter, and without an Order of the Court establishing the amount of an undertaking, the Petitioner apparently deposited the payoff amount with the Bronx County Clerk. On August 20, 2007 the Petitioner's attorney sent a facsimile letter to the Trust's attorney advising that a deposit had been made and that there was a stay but did not include a copy of an Order staying the sale. The foreclosure sale was conducted as scheduled and the property was sold to a third party which subsequently closed on the transaction with the Referee prior to the grant of leave to appeal to the New York Court of Appeals.

The Petitioner brought an Order to Show Cause which sought to cancel the foreclosure sale, to prevent

the referee from conveying the deed to the property and to assess sanctions against the plaintiff's counsel. The application was denied by Decision/Order of Justice Renwick and the Petitioner served and filed a notice of appeal from the denial of the motion. The appeal from the judgment and the appeal from the denial of the post-sale motion were consolidated and both the judgment of foreclosure and the Decision/Order of Justice Renwick entered December 7, 2007 were unanimously affirmed by the First Department. The panel found in pertinent part that "a stay of proceedings under this statute (RPAPL § 1341) is not self-executing; it requires a motion. Jackson Avenue Realty failed to make such a motion, and its deposit of the amount demanded by plaintiffs did not qualify as an undertaking since it was not reviewed or fixed by the Court (CPLR 5519[a][4], [6])". (Citations omitted). It further found that there was no fraud or misconduct in the plaintiff's silence that the sale would proceed and that there was ample support in the record for the award of attorney's fees *NYCTL 1999-1 Trust v. 573 Jackson Avenue Realty Corp.*, 55 A.D.3d 454 (1st Dept. 2008).

On appeal to the New York State Court of Appeals, the Court found that the Petitioner's reliance upon RPAPL § 1341 was misplaced since it only applied to a "partial foreclosure situation", (a foreclosure where "any part of the principal or interest is due, and another portion of either is to become due"). Indeed, in its ruling, the Court went so far as to declare that "[t]o the extent that [certain Appellate

Division cases] suggest that a property owner must comply with RPAPL 1341's requirements – including a motion for a stay and a sum deposited with the court – as preconditions for redemption, these cases should not be followed. An unconditional tender of the full amount due is all that is required". *NYCTL 1999-1 Trust v. 573 Jackson Avenue Realty Corp.*, 13 N.Y.3d 573, 579, 921 N.E.2d 195, 893 N.Y.S.2d 503 (2009)

The Petitioner conceded to the Court that the payment of the funds had been made not to redeem the property from the foreclosure but to stay the sale pending appeal. As such, the Petitioner failed to follow the procedure set forth under CPLR § 5519(a)(6) which governs a stay pending appeal where "the moving party is in possession or control of real property which the judgment or order directs be conveyed". The statute requires "an undertaking in a sum fixed by the court of original jurisdiction that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property . . . if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency".

Instead, the Petitioner utilized a different and inapplicable section of the same statute, CPLR § 5519(a)(2), which is directed to the situation where

"the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed".

In the Court of Appeals, the Petitioner conceded that its objective was to stay the foreclosure pending appeal. They had no intention of redeeming the property from the foreclosure. They erroneously proceeded under the incorrect section of the applicable statute and never obtained a stay of the sale.

POINT I

THE PETITIONER HAD FAILED TO COMPLY WITH RPAPL § 1341(2), WAS NOT ENTITLED TO A STAY OF THE FORECLOSURE SALE AND WAS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW

As noted earlier, it was not the Petitioner's intention to redeem the property from the foreclosure. They wanted a stay pending appeal. But, prior to the ruling in this case in the New York Court of Appeals, in order for one to redeem a property from foreclosure under RPAPL § 1341, the taxpayer must both deposit sufficient funds to redeem the property with the Court *and* make a motion to the Court to stay the sale prior to the sale. "The Appellate Division has made it abundantly clear that '[i]n the absence of

fraud, collusion, mistake, or misconduct, a court is without discretion to set aside a sale of foreclosure unless the requirements of RPAPL §1341 are met.' Hence, where a defendant ' . . . failed to make a payment into court and to make a motion to stay the sale of the property as required by RPAPL §1341(2), [the] right to redemption expired'" (*see NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957, 958 citing, *Bankers Fed. Sav. & Loan Assn. v. House*, 182 A.D.2d 602, 581 N.Y.S.2d 858 (2nd Dept. 1992); *EMC Mtge. Corp. v. Bobb*, 296 A.D.2d 476, 745 N.Y.S.2d 204 (2nd Dept. 2002); *Green Point Sav. Bank v. Oppenheim*, 237 A.D.2d 409, 655 N.Y.S.2d 560 (2nd Dept. 1997))". *Abley Properties, Inc. v. Reid,* 806 N.Y.S.2d 443, 2005 WL 2219041, 2005 N.Y. Slip Op. 51438(U).

"The rule is fundamental that once the prescribed time for redemption has expired the rights of the parties become fixed and unalterable and the court is powerless to extend the time to answer or redeem or to open the default. (*See City of New York v. Nelson*, 309 N.Y. 94 (1955); *City of New York v. Jackson-140 Realty Corp.*, 279 A.D. 668 (2nd Dept. 1951); *City of Peekskill v. Perry,* 272 A.D. 940 (2nd Dept. 1947).)". *Village of Ossining v. Lakin*, 5 Misc.2d 1024, 1025 (N.Y.Sup. 1957).

"RPAPL § 1341 is mandatory in nature and does not allow for a discretionary interpretation or application" *Green Point Savings Bank v. Oppenheim*, 237 A.D.2d 409, 410, 655 N.Y.S.2d 560 (2nd Dept. 1997). *NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957, 959, 763 N.Y.S.2d 836 (2nd Dept. 2003) holds that the Court was precluded from invalidating a sale

in foreclosure where the defendant failed to follow the redemption procedures set forth in RPAPL § 1341.

The Petitioner cites to the case of *Finance Inv Co. v. Gossweiler*, 145 A.D.2d 463, 535 N.Y.S.2d 632 (2nd Dept. 1988) for the proposition that a motion for a stay is not required when depositing funds into court to stop a foreclosure sale. In fact, the case actually provides further support for the premise that one must both deposit the funds into court and make a motion for a stay. In *Finance Inv. Co.* supra, the defendant deposited the money and brought a motion for a stay prior to the sale. The appeal was actually of the lower court grant of a stay upon application of the defendant subsequent to paying the amount due under the mortgage into Court. The Appellate Division affirmed the grant of the stay since the deposit had previously been made. In *Finance Inv. Co.*, supra, the defendant wanted the plaintiff bank to accept the tendered funds. In this case, the Petitioner did not want the plaintiff to accept the funds to stop the sale, he wanted the sale stopped because he wanted to continue to litigate the award of legal fees in the Judgment of Foreclosure and Sale.

The Petitioner failed to strictly comply with RPAPL § 1341 prior to the foreclosure sale, no Court ordered stay was applied for or obtained, the sale took place and the property was sold to a third party and therefore the appellant's right of redemption expired. As shown in the statement of the case, above, this is not a situation where the tax lien was surreptitiously foreclosed without notice to the Petitioner.

This was a heavily litigated foreclosure action throughout. The Petitioner was on notice of all proceedings had in the matter and contested every step of the way. The Petitioner was on notice of the scheduled foreclosure auction of the property and simply failed to utilize the proper method and process of obtaining a stay in effect at the time, to obtain a stay of the foreclosure sale. There was no taking of property without due process.

POINT II

RESPONDENTS' ATTORNEY'S SILENCE IN RESPONSE TO THE PETITIONER'S NOTICE THAT FUNDS HAD BEEN PAID INTO COURT DID NOT CONSTITUTE FRAUDULENT INDUCEMENT NOR DID IT RESULT IN THE TAKING OF THE PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW

Although it is hornbook law that a Court may exercise equitable powers to set aside a judicial sale only where fraud, collusion, mistake or overreaching casts suspicion on the fairness of the sale, *see Guardian Loan Co. v. Early*, 47 N.Y.2d 515 (1979); *Bank of New York v. Sheik*, 279 A.D.2d 440, 719 N.Y.S.2d 259 (2nd Dept. 2001), unilateral mistake should not be a basis for vacating a foreclosure sale. *Dime Savings Bank v. Zapala*, 255 A.D.2d 547, 680 N.Y.S.2d 665 (2nd Dept. 1998). The Petitioner's unilateral mistake in failing to fully comply with the redemption requirements of RPAPL § 1341 did not serve as a basis for the Court to exercise its discretion to invalidate

the foreclosure sale. So too, the Petitioner's erroneous reliance upon the incorrect section of CPLR § 5519 in a failed attempt to stay the foreclosure sale should not operate as a foundation upon which the Court might exercise its discretion to invalidate the sale.

The Petitioner's argument that it was fraudulently induced into believing that the sale had been stayed is flawed. "'[Petitioner] must show both that [Respondents'] misrepresentation induced [Petitioner] to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which [Petitioner] complains (loss causation)'" *Water St. Leasehold LLC v. Deloitte & Touche LLP,* 19 A.D.3d 183, 796 N.Y.S.2d 598 (2005), *lv. denied*, 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467 (2006); quoting *Laub v. Faessel,* 297 A.D.2d 28, 31, 745 N.Y.S.2d 534 (1st Dept. 2002)). *See generally* 60A N.Y. Jur. 2d, *Fraud and Deceit* § 138. Mere silence "without some act which deceived" cannot constitute a concealment that is actionable as fraud. *Mobil Oil Corp. v. Joshi,* 202 A.D.2d 318 (1st Dept. 1994).

Respondents' attorney did not respond at all to the letter sent on August 20, 2007. There was no representation that the sale would not take place upon which the Petitioner could have relied. There was no demand in the August 20, 2007 letter that Respondents confirm that the sale was cancelled. There was no special fiduciary type relationship between Respondents' attorney and the Petitioner or its attorney which would have required an affirmative

acknowledgment that the sale was cancelled. There is no obligation on the part of Respondents' attorney to explain the proper process for the Petitioner's attorney to obtain a stay of the sale, especially in light of the multitude of meritless arguments that had been advanced by him to that point in the action. It was folly for the Petitioner's attorney to think that he had obtained a stay without complying with the various statutes. There must have been some doubt in the mind of the Petitioner's attorney as to whether or not the foreclosure sale was stayed or why would he have attended the sale? The Respondents' attorney's silence in response to the Petitioner's notice does not constitute a taking of property without due process of law.

POINT III

THE PETITIONER'S ATTORNEY'S FAILURE TO UTILIZE THE PROPER STATUTORY PROVISION IN ATTEMPTING TO OBTAIN A STAY PENDING APPEAL, WHILE PERHAPS MALPRACTICE, DID NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW

The Petitioner took it upon himself to unilaterally make a payment to the Bronx County Clerk's office in the amount of $19,563.71 and then mailed a copy of the receipt to Respondents' attorney which was received the afternoon before the sale. The appellant did not provide an Order of the Supreme Court imposing a stay with a copy of the receipt. That is because there was no Order.

The defendant's counsel erroneously relied upon CPLR § 5519(a)(2) as the basis for his assertion that a statutory stay was in effect. The defendant pins its argument that a statutory stay occurred when it paid funds into Court on the erroneous assumption that a Judgment of Foreclosure and Sale is a money judgment.

"It is fundamental that the holder of a note (or bond) and mortgage has two remedies: one at law in a suit on the debt as evidenced by the note, the other in equity to foreclose the mortgage." *Copp v. Sands Point Marina,* 17 N.Y.2d 291, 293, 270 N.Y.S.2d 599, 217 N.E.2d 654 (1996); *see also, Bank Leumi Trust Co. of N.Y. v. Sibthorp,* 135 A.D.2d 476, 522 N.Y.S.2d 568 (1st Dept. 1987).

> A mortgage is recognized to be a lien remedy. The foreclosure of the mortgage is the legal process for realizing upon the lien (*Sautter v. Frick*, 229 A.D. 345, 346, 242 N.Y.S. 369 (4th Dept. 1930), affd., 256 N.Y. 535, 177 N.E.2d 129 (1931)). The principal form of mortgage enforcement is the equitable action to foreclose (*Notey v. Darien Construction Corp.*, 41 N.Y.2d 1055, 396 N.Y.S.2d 169, 364 N.E.2d 833 (1997)). Thereby the encumbered property is sold under the supervision and control of the court and the proceeds of sale applied to the satisfaction of the mortgage lien (Marks, Maloney and Paperno, Mortgages and Mortgage Foreclosure in New York, p. 219). Such an action does not result in a "money judgment" within the purview of the homestead

> exemption provisions of CPLR 5206 (subd. (a)).

Wyoming County Bank & Trust Co. v. Kiley, 75 A.D.2d 477, 480, 430 N.Y.S.2d 900 (4th Dept. 1980). It is respectfully submitted that just as a Judgment of Foreclosure and Sale does not result in a "money judgment" for purposes of the "Homestead Exemption" so too it does not constitute a "judgment or order which direct the payment of a sum of money" for purposes of the application of CPLR 5519(a)(2).

The Petitioner's reliance on the section is misplaced. This section deals with a "judgment or order which directs the payment of a sum of money". A Judgment of Foreclosure and Sale does not direct the payment of a sum of money. It directs that all persons named and served in the action are forever barred and foreclosed of any interest in the subject property, establishes the amount that the plaintiff is owed under the mortgage and directs that the Court appointed referee sell the property in order to recoup some or all of the amount due to the plaintiff. It is not until the foreclosure sale takes place, the closing occurs, a motion is made to confirm the Referee's Report of Sale and for the entry of a deficiency judgment against the defendant that a judgment which directs the payment of money comes into existence.

The applicable portion of CPLR § 5519 is section (a)(6), which provides that where:

> the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed

> by the court of original instance is given that the appellant or moving party will not suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of the mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any deficiency.

A Judgment of Foreclosure and Sale directs the conveyance or delivery of real property just as a specific performance judgment or a warrant of eviction are judgments or orders which direct the conveyance or delivery of real property, and it falls under CPLR § 5519(a)(6). It is not, as the Petitioner suggests, "tantamount" to a judgment or order directing the payment of a sum of money. In *Pfeil v. Hasselbush*, 273 N.Y. 619, 7 N.E.2d 724 (1937), an undertaking was set by the court in a foreclosure action again pursuant to CPA § 598 (the predecessor to CPLR 5519(a)(6)). *See also Homecraft Alterations Corp. v. Brill*, 30 Misc.2d 514, 220 N.Y.S.2d 24 (N.Y.Sup. 1961), which involved the foreclosure of a mechanic's lien, an undertaking was fixed by court pursuant to CPA § 598.

Clearly, the statute envisions the Court establishing an appropriate undertaking and issuing a stay. An undertaking is "a sum fixed by the court"

Du Jack v. Du Jack, 243 A.D.2d 908, 909, 663 N.Y.S.2d 349, 350 (3rd Dept. 1997).

The legislature in crafting the statute saw fit to create separate and distinct procedures for obtaining a stay when "the judgment or order directs the payment of a sum of money" (CPLR § 5519(a)(2)) as opposed to when "the appellant or moving party is in possession or control of real property which the judgment or order directs to be conveyed" (CPLR § 5519(a)(6)).

It is not just a matter of the defendant appellant taking it upon itself to pay what it wants into court. The statute is plain on its face and sets forth the mechanism for the defendant to obtain a stay pending appeal. The mere filing of an appeal in this action was insufficient to stay the action, so too was paying an amount arbitrarily determined by the Petitioner, without a Court order. As Justice Renwick observed and the Appellate Division confirmed, "the undertaking defendant deposited did not satisfy § 5519(a)(6) and the defendant failed to correctly apply and satisfy the requirements of § 5519(a)(6)". There was no stay, the foreclosure sale was properly conducted and there was no taking of property without due process of law.

CONCLUSION

From the time that this tax lien foreclosure was commenced in 2002 until the foreclosure sale occurred in 2007, the Petitioner litigated and contested the action every step of the way and right until the

conclusion of the foreclosure sale, the Petitioner could have redeemed the property from the foreclosure by unconditionally paying what was due under the Judgment of Foreclosure. That is not what it ended up doing. The Petitioner disputed the award of legal fees in the Judgment of Foreclosure as well as the amount found by the Referee to be due on the lien and sought to challenge it on appeal. But he failed to follow the statutory scheme set forth to obtain a stay where the judgment directed the sale of property under the Petitioner's control. Neither the Petitioner's erroneous reliance upon the incorrect method of obtaining a stay in this foreclosure action, nor the facts and results of this foreclosure action present an issue of public importance and the ultimate sale of the property under the Court's direction and control does not constitute a taking of property without due process of law as contemplated by the Fourteenth Amendment of the United States Constitution, and therefore the Writ of Certiorari should not be granted.

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Plainview, New York 11803

Respectfully submitted,

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